IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 9TH APRIL 2007 / 19TH CHAITHRA 1929

CRL.A.No. 1132 of 2004(C)

SC.1/2002 of SESSIONS COURT, LAKSHADWEEP
CP.1/2002 of JUDL. MAGISTRATE OF FIRST CLASS COURT, ANDROTH
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APPELLANT:

P.HUSSAIN, CONVICT NO.8597,
CENTRAL PRISON, KANNUR.

BY ADV. SRI.E.D.GEORGE.(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY A
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SHRI K.C. SANTHOSHKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. Koshy & T.R. Ramachandran Nair, JJ.

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no direct eye witness to the incident.

4. The accused/appellant has given a confession statement before the Judicial First Class Magistrate's Court on 29.9.2001. He admitted his guilt. In the 313 statement also he admitted the crime. The defence set up is under Section 84 of the I.P.C. According to the appellant, he was having mental illness at the relevant time and was undergoing some treatment also at that time. P.W.1 deposed before the court that they were married 15 years back and had three children, viz. Hissana, Mohammed Thahir and Thafeera. The appellant is a teacher by profession and he was working as a teacher in Androth Island and was transferred to Amini Island in May 2001. On the date of occurrence, after taking dinner at about 8.30 p.m. the children went to sleep. Hissana was on the cot and Thafeera on the mat in the floor of the bedroom. Parents of P.W.1 were living in the nearby house and the son of the appellant was in that house. At 9 P.M. P.W.2, father of P.W.1 came to their house and asked whey they have not closed the door. According to P.W.1, wife of the accused, when P.W.2 returned, she had gone to the bathroom which was only 10 meters away from the house and when she went back from the bathroom after about 15-20 minutes and was about to enter the house after collecting the cloth which were spread outside for drying as it was raining, she found the accused with a bloodstained knife at

the door and he told her that the children have been killed and she need not enter the house. After telling these words to her, he ran away to the northern side. On entering the room, she found the elder child lying in the cot with one hand dropping and the neck with cut injuries and hanging down. She also saw the younger daughter with blood oozing out from her neck. She cried aloud that her children had been killed and hearing it, her father came immediately and some others also rushed in. She identified M.O.1 as the knife which was used in their house and which she saw in the hands of the accused. The suggestion made by the defence to P.W.1 during cross- examination was that the accused was having some mental illness at that time. P.W.1 denied it and stated that she is not having any knowledge that the appellant was taking treatment for mental illness. She only stated that she had seen him taking some tablets and it never came to her knowledge that they are meant for mental illness. She also stated that she is not aware about any visit made by her husband to the Main Land to see any doctor and she is not aware of any names of such doctors also. She also denied the suggestion that the accused was being treated by one Dr. Venugopal who was the Head of the Psychiatric Wing of the Medicare Hospital, Ernakulam. The only statement made by her is that he had undergone treatment for head ache at Amini and one Dr. Basheer was

treating him for that ailment. She stated that his behaviour in the house as well as in the work place was normal. There was no occasion for complaints being made by co-workers or students. In the cross examination it was also suggested that accused had doubted her character.

5. P.W.2 is the father of P.W.1 and maternal uncle of accused. According to him, after the death of the parents of the accused in his childhood, he was brought up by P.W.2 himself and he never found anything unusual in his character. Just before the occurrence he had gone to the house where P.W.1 was residing which is very near to his own residence. About 15-20 minutes after he returned, he heard the cry of P.W.1 and he rushed to the house immediately and found the grandchildren lying in a pool of blood. He denied that he had further stated to police that accused was taking sleeping pills. Earlier, accused was treated for a day as inpatient in Susrusha Nursing Home. But it is not a mental hospital. P.W.3 is the brother-in-law of P.W.1 who also rushed to the scene and had made arrangements to take the children by an autorickshaw to the hospital. P.W.4 is the son of P.W.1's sister who also went there on hearing about the incident. P.W.4 deposed that Dr. Venugopal examined the accused in 1998 but told that his problem is relating to the blood and gave him tablets. P.W.4 further deposed that in 2000 he was treated in Susrusha Nursing

Home and Doctor David, a clinical psychiatrist examined him. When P.W.4 asked him to hypnotize, doctor told him that hypnotism is not necessary. Only some pills are enough. P.W.6 is the Medical Officer who had first seen the bodies at the place of incident on the night and he had performed the postmortem in the hospital. The following injuries were noted in the postmortem certificate:

> "i) A semicircular slash wound in front of the neck extending from a point 5 cm below the right mastoid process to a point 4.5 cm below the left mastoid process. Length of the wound is 11 cm. Depth of the wound varied from right to left. Right side depth 5 cm and midline and left side depth 3 cm. Edges of the wound are sharpened inverted. Skin, sucutaneous tissue, platysma, treches, oesophagound, sternomastoid muscle of both sides, jugular vein and cartoid arteries of both sides are completely cut. Vertebral column at C4 level partially cut on the right side leaving the spinal cord intact.
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> ii) cut wounds on right hand:
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> a) An incised wound of 1.2 cm in length x 0.5 cm in breadth, bone deep on the palmar aspect of the terminal phalanx of right index finger.
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> b) (i) An incised wound of 1.2 cm in length x 0.5 cm in breadth, bone deep on the palmar aspect of the right middle finger in the junction of the middle and terminal phalanx.
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> (ii) An incised wound of 1 cm in length x 0.2 cm in breadth and skin deep on the palmar aspect of terminal phalanx of right middle finger x 1 cm distal to wound b(i).
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> c) An incised wound of 1 cm x 0.3 cm muscle deep in the palmar aspect of terminal phalanx of right ring finger."

6. The defence version is that he had committed the crime in a state of unsoundness of mind and therefore he is protected under Section 84 of

the I.P.C. A written statement was filed as part of 313 questioning wherein he stated that for his mental illness he was being treated by Dr. Venugopal and Dr. David. He was taking pills given by them. His problem was that he was having bad dreams regarding his wife. In 164 statement before the Magistrate also he stated that even though he loves his wife and children, he used to see dreams to the effect that his wife is committing adultry. Section 84 provides as follows:

> "84. Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

Herein, no evidence have been adduced by the defence to show that the accused was insane at the time when the incident occurred. Apart from the suggestions made to the witnesses and the statements made in the 313 statement no medical evidence have been adduced to prove that he was under mental treatment and he was even treated earlier for mental illness. Learned Public Prosecutor relied upon the decision of the Honourable Supreme Court reported in **T.N.Lakshmaiah v. State of Karnataka (**(2002) 1 SCC 219) to contend that the burden is on the accused to prove that the crime was committed in a spell of insanity for benefit of exemption under Section 84 I.P.C. Their Lordships of the Supreme Court held in

paragraphs 8 & 9 as follows:

> "8. The principle embodied in the Chapter is based upon the maxim *actus non facit reum, nisi mens sit rea* i.e. an act is not criminal unless there is criminal intent.
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> 9. Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case."

It was held further that in a case where the exception under Section 84 I.P.C. is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bonafide or an afterthought. It was held that in the absence of any evidence, no inference can be taken that he committed the crime without knowing the implications of the same. Further, herein the accused had confessed his guilt before the Magistrate which is produced as Ext.P15. That shows that he knew that he had killed

his children and it is an offence. Learned Magistrate who was examined as P.W.9, on production of the accused had put certain questions to him and has recorded in Ext.P15 that the appellant had given the answers to the questions in a well reasoned and sound manner. It was also recorded that the confession has been made voluntarily without being influenced by the police or anybody else. He had also stated that he is not suffering from any disease and he also stated that he does not want any legal assistance.

7. We find that in the absence of any evidence to support the plea of unsoundness of mind, the appellant cannot succeed on his plea of exception under Section 84 I.P.C. This court has examined the question in a recent decision reported in **Hussain v. State of Kerala** (I.L.R.(2005) 4 Ker. 239) This court held as follows:

> " The crucial point of time at which unsoundness of mind should be established is the time when the crime was actually committed and the burden of proving this lies on the accused. The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) the prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S.84 of the Penal Code; the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings; (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence,

the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. The principles which are to be borne in mind while applying S.84 I.P.C. are the following:

a) every type of insanity is not legal insanity; the cognitive faulty must be so destroyed as to render one incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law;

b) the court shall presume the absence of such insanity;

c) the burden of proof of legal insanity on the accused, though it is not as heavy as on the prosecution;

d) the court must consider whether the accused suffered from legal insanity at the time when the offence was committed;

e) in reaching such a conclusion, the circumstances which preceded, attended or followed the crime are relevant considerations; and

f) the prosecution in discharging its burden in the face of the plea of legal insanity has merely to prove the basic fact and rely upon the normal presumption of law that everyone knows the law and the natural consequences of his act.

If any of the aforesaid circumstances is taken in isolation, the same may not be sufficient to strengthen the plea of insanity. It is the totality of the circumstances evaluated in the light of the evidence on record that has to be considered in this connection. So, viewed, we are definitely of the conclusion that even though the accused caused the death of Mohammedali by stabbing him to death, he was at the time of committing the acts attributed to him non compose mentis and is, therefore, entitled to the benefit of S.84 I.P.C. as per which the acts committed by the accused do not constitute an offence. The appellant is accordingly found not guilty of the charge of murder and is acquitted of the offence punishable under S.302 I.P.C.

The fact that immediately when his wife came back, accused told her that children were killed, shows that he knew what he was doing and he was not incapable of knowing the nature of the act. He reported to the police station with the blood stained knife. It shows that he was aware what he was doing is a wrong and contrary to law. Merely because in his dreams he was seeing that his wife was having illegal relations, it cannot be said that there is legal insanity to claim protection under Section 84 I.P.C. There is no evidence to support the plea of insanity in this case to grant the benefit of Section 84 I.P.C. Learned Sessions Judge was right in concluding that the accused had committed the murder with full knowledge of the consequences of his act and is guilty of the offence under Section 302 I.P.C. Hence the appeal is dismissed confirming the conviction and sentence awarded by the Sessions Court.

(J.B. Koshy, Judge.)

(T.R. Ramachandran Nair, Judge.)

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J.B. Koshy & T.R. Ramachandran Nair, JJ.

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